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No. 99-1908

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

1. The State policy at issue below – the Alabama Department of Public Safety's (the Department's) rule requiring that driver's license examinations be administered only in English – was adopted in 1991, more than a year after the ratification of an amendment to the Alabama Constitution declaring English to be "the official language of the state." ALA. CONST. amend. 509; *see* App. 58a – 60a. Prior to that time, Alabama – like forty-eight other states and the District of Columbia – administered its driver's license examination in numerous foreign languages. *See* App. 58a.[1] The State had obtained foreign language versions of the written examination at "no cost" and had encountered "no significant problems in administering" them prior to the change in policy. App. 59a.

2. Even after the adoption of the English-only rule, the Department continued to issue Alabama driver's licenses on a routine basis to new residents who could not speak or read English, as long as they had valid licenses from another state. App. 185a. Alabama simply refused to accommodate its own residents who were not fluent in English. "By providing special accommodations to illiterate applicants, handicapped applicants, [non-English speaking] out-of-state drivers with valid licenses and even foreign nationals with valid licenses, Alabama

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[1] West Virginia, the only other state that did not accommodate non-English speaking persons at the time of trial, reportedly began to offer foreign language versions of its examination in 1999. Phillip Rawls, *Court Agrees on Alabama Driving Tests*, AP, Dec. 1, 1999, *available in* LEXIS, Nexis Library, AP Online File.

single[d] out resident non-English speaking applicants by requiring them to take their examination in English only, without the aid of interpreters or translation aids." *Id.*

3. Shortly after the English-only driver's examination policy was adopted, the Alabama Attorney General issued an opinion stating that the policy "might be a violation of Title VI of the Civil Rights Act of 1964," citing this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974).[2] Nevertheless, the opinion supported the requirement, citing "consideration[s] of safety and the integrity of the licensing process." Neither of these considerations actually prompted the adoption of the Department's English-only rule. App. 10a.

4. The plaintiffs filed this lawsuit in 1996, alleging that the Department's English-only policy had an unjustified disparate impact on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d – 2000d-1, and its implementing regulations. The plaintiffs also alleged that the policy violated the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as enforceable pursuant to 42 U.S.C. § 1983. Plaintiffs sought only declaratory and injunctive relief.

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[2] The opinion accurately described *Lau* as holding "that a public school district receiving federal financial assistance violates Title 6 of the Civil Rights Act of 1964 where the school system fails to establish a program to deal with the language problem of students of Chinese ancestry who do not speak English." Pl. Ex. 5 at 2.

5. After a two-day trial, the district court held that the Department's English-only rule violated the Title VI disparate impact regulations of two federal agencies that provide millions of dollars of federal financial assistance to the Department. *See* 28 C.F.R. § 42.104(b)(2) (DOJ regulation); 49 C.F.R. § 21.5(b)(2) (DOT regulation). Specifically, the court found (1) that the English-only policy had a disparate impact on the basis of national origin; and (2) that the Department did not have a substantial, legitimate justification for its policy. At the commencement of the trial, the court had granted the Department's summary judgment motion on the plaintiffs' 42 U.S.C. § 1981 claim on the ground it was duplicative of the Equal Protection claim; however, it ultimately reserved ruling on the claim that intentional discrimination on the basis of language violated the Equal Protection clause. R3 – 80.

6. "Rather than mandate specific relief," the district court enjoined the Department from enforcing its English-only policy and directed it, "in conjunction with the Plaintiffs, [to] fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." App. 252a – 53a. Prior to the deadline for filing a status report "outlining the Parties' progress in formulating proposed policies and practices consistent with [the district court's] Memorandum Opinion," App. 254a, this Court granted certiorari in *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, *writ dismissed as moot*, 524 U.S. 974 (1998), and the Department moved for a stay pending appeal. R3 – 71. The plaintiffs opposed the stay. R3 – 77. Before the district court ruled on the motion, the parties

filed and the district court granted a joint motion for a stay based upon an agreement between the parties. R3 – 82; R3 – 83. Under the terms of the agreement, the Department promised "to implement a program of testing in languages other than English," and the plaintiffs agreed that the program would "not be subject to the oversight of the District Court, [plaintiffs' counsel], or anyone else." R3 –-82. The Department reserved "the right to modify [its] interim program" during the pendency of the stay, and both parties reserved the right to press for a different remedy if and when the stay was lifted. R3 – 82.

7. On appeal, the court of appeals emphasized that the Department did "not contest any of the district court's findings of fact – either as to the disparate impact of the policy on non-English speaking license applicants or the pretextual nature of the policy justifications offered by the State." App. 49a. The court unanimously affirmed the judgment below, holding that "Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination." App. 57a. The court stated that its conclusion was "reinforced by Supreme Court case law and the uniform position taken by our sister circuits." App. 37a.

REASONS FOR DENYING THE WRIT

There are no compelling reasons that would justify granting the petition in this case. Petitioners have not challenged the conclusion of the court below that their

English-only policy violates the Title VI discriminatory effects regulations. Instead, they have limited their Petition solely to the question of the availability of a private right of action under the regulations. The mere fact that the Court granted certiorari on this question in *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, *writ dismissed as moot*, 524 U.S. 974 (1998), does not mean that it should do so here. *See Ryan v. Powell*, 120 S. Ct. 579 (1999) (denying certiorari in case raising issue of the availability of private right of action under Title VI regulations). Like the petitioners in *Ryan v. Powell*, the petitioners here seek to involve the Court in litigation at the interlocutory stage. No remedial order has been entered in this case – a point that may raise questions about the Court's jurisdiction. And because this case, like *Ryan v. Powell*, involves a state agency that receives federal funds, 42 U.S.C. § 1983 will provide a remedy even if one is not available directly under the Title VI regulations.

Since the grant of certiorari in *Chester Residents*, few Title VI disparate impact cases have reached the courts of appeals. The two courts that have decided the issue – the Third and Eleventh Circuits – have concluded without dissent that private parties may bring actions for injunctive relief under the Title VI regulations. This result is not surprising. For more than two decades, private lawsuits to enforce the regulations have been part of the legal landscape. Following this Court's lead, the lower courts have consistently recognized that individuals may seek injunctive relief under the Title VI regulations, Congress has expanded the reach of Title VI with this remedy in mind, and the Executive branch has endorsed this equitable remedy as critical to the enforcement of the Civil

Rights Act. Because the decision below does not conflict with any decisions of this Court or the courts of appeals – including any decisions that have addressed English-only policies – there are no good reasons to engage in judicial revisionism this late in the day.

I. THE ORDER HERE IS INTERLOCUTORY

The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for certiorari).[3] Just as in the *VMI* case, the district court here "expressly declined to rule on the 'specific remedial course that the [defendants] should or must follow.' " *Id.* (citation omitted). "Rather than mandate specific relief," the district court ordered the Department, in consultation with the plaintiffs, to submit a remedial plan. App. 65a, 252a – 53a. Because the case was

[3] *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (opinion of Ginsburg, J., respecting the denial of the petition for certiorari); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916) (certiorari jurisdiction should be "exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree"); *American Const. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

stayed pending appeal, no remedial-plan has been submitted to the district court for its consideration.

Because the trial court has not entered final judgment, there may be a question about this Court's jurisdiction. In the court of appeals, the parties agreed that the court had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) on the basis of the order the district court had entered "enjoin[ing]" the Petitioners from "the enforcement of the Department's English-Only Policy." App. 253a.[4] Although the district court had declined to "mandate specific relief" until the Petitioners had an opportunity to submit a proposal "consistent" with the district court's opinion, App. 252a – 54a, the combination of circumstances present in this case sufficed to provide jurisdiction under Eleventh Circuit case law. *See, e.g., United States v. Alabama*, 828 F.2d 1532, 1536-38 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988). But other courts have held that an order to submit a plan, even when issued in conjunction with an order denominated as an injunction, is not sufficient. *See, e.g., El-Tabech v. Gunter*, 992 F.2d 183, 185 (8th Cir. 1993); *Sherpell v. Humnoke Sch. Dist. No. 5*, 814 F.2d 538, 539 (8th Cir. 1987).

Denying certiorari would protect the integrity of the Court's decision-making process. The general practice of denying interlocutory review does not rest simply on the policy of discouraging piecemeal litigation or reducing

[4] *See* Letter from Counsel to the Clerk of the United States Court of Appeals for the Eleventh Circuit (Mar. 26, 1999). The parties relied upon 28 U.S.C. § 1292(a)(1) rather than 28 U.S.C. § 1291 because the district court had reserved ruling on the Equal Protection claim.

the risk that appellate jurisdiction may be found lacking. It also rests on the importance of deciding cases in concrete settings. *See Texas v. Hopwood*, 518 U.S. at 1033 (opinion of Ginsburg, J., respecting the denial of the petition for certiorari) (citation omitted) (because the Court " 'reviews judgments, not opinions,' " it should "await a final judgment on a program genuinely in controversy"). Contrary to the suggestions of the Petitioners and their Amici,[5] the trial court here has not ordered the Department to use foreign languages. Instead, the court had ordered the Department merely to "fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." App. 253a; *see* App. 227a ("Without deciding which practices would meet the requirements of Title VI, while also meeting the administrative concerns of the Department, the court simply notes that the Department currently does nothing, officially, to accommodate non-English speaking resident applicants."). The trial court recognized that the "Department, and not th[e] court, is in a better position to examine its administrative constraints and formulate a policy that addresses [its] concerns." App. 228a. Although respondents anticipate that the Department ultimately will propose to use written foreign language exams because it has done so without difficulty or significant expense in the past, the Department has not been compelled to accommodate non-English speaking persons in

[5] *See* Pet. at 19; Brief of English Language Advocates and English First Foundation as *Amici Curiae* in Support of the State of Alabama at 2, 6-9 (Brief of English Language Advocates).

this way. Allowing the use of interpreters or translation dictionaries, for example, might be other options. Whatever the trial court ultimately orders, denying certiorari at this stage would "not, of course, preclude [the petitioners] from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Military Inst. v. United States*, 508 U.S. at 946 (opinion of Scalia, J., respecting the denial of the petition for certiorari).

II. AS A PRACTICAL MATTER, PRIVATE PLAINTIFFS WILL BE ABLE TO ENFORCE THE TITLE VI REGULATIONS AGAINST STATE AGENCIES EVEN WITHOUT AN IMPLIED RIGHT OF ACTION

Like the plaintiffs in *Ryan v. Powell*, 120 S.Ct. 579 (denying certiorari in case raising issue of the availability of private right of action under Title VI regulations), the plaintiffs here brought suit for declaratory and injunctive relief against a state agency that receives federal financial assistance. Because the state official in charge of the agency could be sued in his official capacity for injunctive relief under 42 U.S.C. § 1983 for failing to adhere to the Title VI regulations, the availability of relief in a case such as this will not turn, as a practical matter, on the answer to the implied right of action question presented.

The district court here actually ruled that there were two alternative bases that would support the plaintiffs' claim for relief.[6] First, the court ruled that the Title VI

[6] At the time of trial, it was firmly established in the Eleventh Circuit that the Title VI disparate impact regulations

regulations created rights that could be enforced through 42 U.S.C. § 1983. App. 88a – 91a. *Powell v. Ridge*, 189 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999), reached this result, as did Justice Stevens in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 645 (1983) (Steven, J., dissenting). *See also id.* at 608 (Powell, J., concurring) ("[M]ajority . . . would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U.S.C. § 1983. . . . "). Even absent an implied right of action, the law favors the availability of § 1983 claims because § 1983 is an "alternative source of express congressional authorization of private suits." *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) (citations omitted).

Second, the district court ruled that the plaintiffs had "a private right of action as third-party beneficiaries to contracts entered into by the Department that contain provisions requiring the Department to comply with federal non-discrimination laws as a condition of receiving federal funds." App. 112a. As authority for this proposition, the court cited, among other things, the former Fifth Circuit's opinion in *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 850 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (citation omitted) (" 'Defendants by their contractual

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supported a private cause of action. *See* App. 38a ("We have recognized an implied private cause of action to enforce disparate impact regulations arising under Title VI three times."). As a result, there was no need for the plaintiffs to rely upon any alternative theories.

assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools.' "), a decision that this Court recognized as authoritative in *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979) ("a distinguished panel" decided *Bossier* "in an opinion that was repeatedly cited with approval and never questioned"). *See also Lau v. Nichols*, 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring in result) (private plaintiffs could sue for injunctive relief "as beneficiaries of the federal funding contract"); Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 Harv. C.R.-C.L. L. Rev. 1 (1983).

III. THERE ARE NO COMPELLING REASONS TO REVISIT A QUARTER CENTURY OF PRECEDENT

The decision below recognizing a private right of action under the Title VI regulations is consistent with the decisions of this Court and those of the courts of appeals. As this Court has recognized, Congress intended for Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to be enforced by private parties. *See Cannon v. University of Chicago*, 441 U.S. at 696 (Title IX private remedy "explicitly assumed" from private remedy for Title VI); *see also Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) (Congress validated and relied upon private enforcement of Title VI when it passed 42 U.S.C. § 2000d-7). "[T]o effectuate the provisions" of Section 601, 42 U.S.C. § 2000d-1, "every Cabinet department and about 40 federal agencies [have] adopted

Title VI regulations prohibiting disparate-impact discrimination." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 592 n.13 (1983) (White, J., announcing the judgment of the Court). For more than two decades, the courts have recognized a private right of action to enforce the regulations. The Executive branch has endorsed the courts' view. And Congress, with full knowledge of the judicial construction, has approved and built upon it. Because lawsuits under the Title VI regulations have become part of the legal landscape, the Court should not revisit the issue in this case. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (recounting Court's acceptance of private right of action under SEC regulation, Rule 10b-5, in light of 25 year history of lower court recognition of such actions); *see generally Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (citation omitted) ("stare decisis has 'special force' in statutory interpretation").

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court's first case construing Title VI and its implementing regulations, the Court held that the San Francisco school system's policy of providing instructions only in English violated the rights of non-English speaking students to an equal educational opportunity. To Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, it was "not entirely clear that § 601 of [Title VI], standing alone, would render illegal" the school system's policy. *Id.* at 570 (Stewart, J., concurring). Because federal regulations "clearly" prohibited the English-only policy at issue, the "critical question" for Justice Stewart was "whether the regulations and guidelines promulgated by HEW [went] beyond the authority of § 601." *Id.* at 570-71. Emphasizing

the consistency of the agency's interpretation, Justice Stewart concluded that the regulations were valid and that private plaintiffs could sue for injunctive relief "as beneficiaries of the federal funding contract between" the federal government and the fund recipient. *Id.* at 571 n.2.

Bakke undercut the *Lau* majority's apparent assumption that Title VI, standing alone, reaches discriminatory effects claims. *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). But "no Justice in *Bakke* took issue with the view of the three concurring Justices in *Lau*, who concluded that even if Title VI itself did not proscribe unintentional racial discrimination, it nevertheless permitted federal agencies to promulgate valid regulations with such effect." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. at 591-92 (White, J., announcing the judgment of the Court). When the Court examined the issue again in *Guardians*, a majority of the Court concluded that the Title VI empowered federal agencies to make unlawful, through their implementing regulations, policies and practices that have unjustified discriminatory effects. *See id.* at 584 n.2, 593 (White, J., announcing the judgment of the Court); *id.* at 623 n.15 (Marshall, J.); *id.* at 643 (Stevens, J., joined by Brennan and Blackmun, JJ.).[7]

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[7] No challenge to the validity of the regulations themselves is before this Court. Petitioners did not press such a claim below; to the contrary, the court of appeals held that Petitioners had "concede[d] that the Department of Public Safety is subject to such [discriminatory effects] regulations." App. 36a; *see also* Pet. C.A. Br. 27-28. Consistent with their previous position, the Petitioners' "question presented" does not seek review of the validity of the discriminatory effects regulations, only their private enforcement. *See* Pet. i. The validity of the regulations is

A majority of the Court in *Guardians* also held that the disparate impact regulations could be enforced through private lawsuits. Two Justices reached this result under the regulations; *id.* at 584 n.2 (White, J., announcing the judgment of the Court); *id.* at 623 n.15 (Marshall, J., dissenting); three others relied upon 42 U.S.C. § 1983, but did not foreclose the implied right of action route. *See id.* at 645 and n.18 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). When summarizing the *Guardians* outcome in *Alexander v. Choate*, 469 U.S. 287 (1985), the difference in the source of the right of action against a state agency appeared to make little difference to the Court. As the Court explained in a unanimous opinion:

> No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact

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not "fairly included" within this question. *See Yee v. Escondido*, 503 U.S. 519, 535 (1992); *Missouri v. Jenkins*, 515 U.S. 70, 103 (1995) (O'Connor, J., concurring); *cf. Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (petition seeking review of elements of private right of action does not fairly include whether private right of action exists). Although there is some stray language in the Petition (Pet. 13-14, 17) that could possibly be read as posing a challenge to these regulations, this Court has explained that "the fact that [petitioner] discussed this issue in the text of its petition for certiorari does not bring it before us." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 n.5 (1993) (per curiam).

> on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.

Id. at 293 (footnote omitted).

It is quite fanciful for Petitioners to suggest that *Alexander* supports the view that the Title VI regulations can be enforced only through agency proceedings and not private litigation. *See* Pet. 12-13. As the *Alexander* Court explained, "to the extent our holding in *Guardians* is relevant to the interpretation of § 504 [of the Rehabilitation Act of 1973], *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case." 469 U.S. at 294. Like *Alexander*, *Guardians* itself was a private action. Had the Court in *Guardians* meant to confine enforcement of the regulations to agency proceedings, it would have been unnecessary for a majority of the Justices to consider the form of relief available in private lawsuits.

Following *Guardians*, *Alexander*, and *Lau*, every circuit to explicitly consider the issue – the Third, Seventh, and Eleventh Circuits – has held that private parties may enforce the Title VI disparate impact regulations in suits for injunctive relief. *See, e.g.*, App. 37a – 42a; *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act."); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d

1403, 1417 (11th Cir. 1985). Every other circuit has recognized the same point.[8]

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[8] *See, e.g., Ferguson v. City of Charleston*, 186 F.3d 469, 479 n.10 (4th Cir. 1999) ("Although the statutory language of Title VI addresses only intentional discriminations, federal agencies that provide funds may prohibit disparate impact discrimination through regulations implementing Title VI."), *cert. granted on other grounds*, 120 S. Ct. 1239 (2000); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) ("Although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent."); *New York Urban League Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (evaluating the plaintiffs' claim under Title VI disparate impact regulations); *Latinos Unidos de Chelseaen Accion (LUCHA) v. Secretary of HUD*, 799 F.2d 774, 785 (1st Cir. 1986) (evaluating the plaintiffs' claim under Title VI disparate impact regulations); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981-83 (9th Cir. 1984) (noting that a majority of Justices in *Guardians* held that "proof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute, rather than the statute itself"); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 466 n.11 (5th Cir. 1986) ("Thus a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."); *see also Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (noting in dicta that "[a] plaintiff may pursue a claim under a disparate impact theory as well"); *Adams v. Bell*, 711 F.2d 161, 167 n.35 (D.C. Cir. 1983) (en banc) ("private suits provide an appropriate and effective mechanism for judicial consideration of compliance with Title VI"), *cert. denied*, 465 U.S. 1021 (1984); *Miener v. State of Missouri*, 673 F.2d 969, 973-976 (8th Cir.), (recognizing private remedy under § 504 of Rehabilitation Act in light of weight of authority and incorporation of

In addition to recognizing that Title VI regulations may be privately enforced, the courts of appeals have applied the same legal standards in analyzing the cases.[9] Contrary to the Petitioners' suggestions (Pet. 6), there has been no explosion of litigation. Since the decision in *Lau* 26 years ago, the courts of appeals have decided only 14 Title VI disparate impact cases on the merits.[10] In only

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Title VI remedies), *cert. denied*, 459 U.S. 909 (1982); *but cf. New York City Envtl. Justice v. Giuliani*, 214 F.3d 65 (2d Cir. 2000) (availability of a private right of action an open question in the Second Circuit).

[9] Plaintiffs are required to make a prima facie showing that a facially neutral practice has a racially disproportionate impact. If plaintiffs meet that initial burden, the defendants must demonstrate a substantial, legitimate justification for the policy. If defendants can so demonstrate, plaintiffs must then show that there is an equally effective alternative practice that results in less racial disparity or that the defendants' practices are a pretext for discrimination. *See, e.g., Powell v. Ridge*, 189 F.3d at 393-94; *Ferguson v. City of Charleston*, 186 F.3d at 480; *Larry P. v. Riles*, 793 F.2d at 982; *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d at 1417.

[10] In addition to this case, those cases are: *Ferguson v. City of Charleston*, 186 F.3d 469; *Caractor v. Town of Hempstead*, 159 F.3d 1345 (2d Cir. 1998); *Villanueva v. Carere*, 85 F.3d 481; *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *Quarles v. Oxford Municipal Separate School District*, 868 F.2d 750 (5th Cir. 1989); *Latinos Unidos de Chelseaen Accion (LUCHA) v. Secretary of HUD*, 799 F.2d 774; *Craft v. Board of Trustees of the Univ. of Illinois*, 793 F.2d 140 (7th Cir.), *cert. denied*, 479 U.S. 829 (1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403; *Larry P. v. Riles*, 793 F.2d 969; *Castaneda v. Pickard*, 648 F.2d 989; *NAACP v. Medical Center Inc.*, 657 F.2d 1322 (3d Cir. 1981); *Guardians Ass'n of New York City Police Dept. v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582 (1983).

one of those cases, besides this one, did the plaintiffs prevail.[11] The relatively small number of cases and the consistency of their outcomes reflects that private lawsuits enforcing the Title VI regulations are not unmanageable. *Cf. Cannon v. University of Chicago*, 441 U.S. at 709 (victims of discrimination "have had private Title VI remedies available at least since 1965 . . . respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that . . . the courts have been unduly burdened").

The footnote in *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), to which Petitioners point for support, *see* Pet. at 15-16, does not signal a retreat from the conclusion that private parties may enforce agency regulations.[12] The plaintiffs in *Fordice* did not raise a disparate impact claim because the case concerned the proper remedy in the case of a university system that had engaged in *intentional* discrimination. Although the Court in *Fordice* held that

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[11] That case was *Larry P. v. Riles*, 793 F.2d 969.

[12] The relevant portion of the *Fordice* footnote upon which Petitioner relies reads as follows:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effect of prior discrimination." Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. [citing opinions in *Guardians* and *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978)]. We thus treat the issues in these cases as they are implicated under the Constitution.

United States v. Fordice, 505 U.S. at 732 n.7.

Title VI "affirmative action" regulations did not impose a different substantive standard than the Constitution in that context, it did not question the right of private parties to sue to enforce those regulations. *Cf. Bazemore v. Friday*, 478 U.S. 385, 407 (1986) (adjudicating on the merits private plaintiffs' claim that fund recipient was not complying with regulations promulgated pursuant to Title VI). Finally, as the court below noted, the fact that the *Fordice* opinion was "authored by Justice White, the crucial fifth vote" in *Guardians* makes it particularly unlikely that the *Fordice* Court intended to change the law "in so oblique a manner." App. 47a, n.24.

What makes the Petitioners' suggestion – that *Fordice* was intended to signal a retreat from *Lau*, *Guardians*, and *Alexander* – all the more remarkable is the fact that the Court has continued to rely upon Justice White's conclusion in *Guardians* that private plaintiffs could obtain injunctive relief in a suit brought to enforce the Title VI discriminatory effects regulations. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Justice White's opinion announcing the Court's judgment in *Guardians Ass'n v. Civil Serv. Comm'n for New York City*, for instance, concluded that the relief in an action under Title VI alleging unintentional discrimination should be prospective only"). Significantly, *Gebser* was decided after the Court granted certiorari in the *Chester Residents* case.

Permitting a private right of action for injunctive relief to enforce the Title VI regulations is not inconsistent with the statute, nor would it make the administrative enforcement procedures under § 602 of the Act, 42 U.S.C. § 2000d-1, redundant as the Petitioners' repeatedly claim. *See* Pet. at 12-13. The administrative procedures were

intended to serve as a check on the power of federal agencies to terminate federal funds, not as a barrier to private enforcement actions for injunctive relief under Title VI. *See* 42 U.S.C. § 2000d-1; *Cannon v. University of Chicago*, 441 U.S. at 704-06; *see also Newman v. Piggie Park*, 390 U.S. 400, 401-02 (1968) (per curiam) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). Just as private actions alleging intentional discrimination under Title VI are not inconsistent with the existence of the statutory administrative procedures that federal agencies must follow when they address charges of intentional discrimination, *see Cannon v. University of Chicago*, 441 U.S. at 705-06 ("award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with – and in some cases even necessary to – the orderly enforcement of the statute"), so too are private actions to enforce the Title VI regulations not inconsistent with the statutory scheme.

The Department of Justice, one of the two agencies whose regulations are at issue here, has taken the position in this case that providing a private remedy for injunctive relief is not inconsistent with the Title VI statutory scheme. *See* Brief for the United States as Intervenor and as *Amicus Curiae* at 30-33, *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (No. 98-6598). This Court recognized the importance of the Government's view in this regard in *Cannon*, noting that the agency charged with administering the statute in that case "perceives no inconsistency between the private remedy and the public remedy. On

the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes." *Cannon v. University of Chicago*, 441 U.S. at 706-707.

When Congress passed the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, it validated and relied upon the courts' decisions that private parties may enforce the statutory prohibition against discrimination contained in Section 601 of Title VI. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 72; *id.* at 78 (Scalia, J., concurring) (citation omitted) (the Act " 'must be read . . . as a validation of *Cannon's* holding' "). When Congress passed the Civil Rights Restoration Act of 1987, it likewise acquiesced in and relied upon the courts' decisions that private parties may enforce agency regulations designed "to effectuate the provisions of" Section 601. 42 U.S.C. § 2000d-1. "When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts . . . Congress need not have intended to create a new remedy, since one already existed . . . [rather] the question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. 353, 378-79 (1982).

Congress enacted the Restoration Act to expand the reach of Title VI in response to the decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). At the time that Congress passed the Act – a decade after *Guardians* and *Alexander* had been decided – it knew that the courts had held that the Title VI regulations could be enforced by

private plaintiffs. This conclusion does not rest "on attributed rather than actual congressional knowledge." *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 77 (Scalia, J., concurring). During extensive congressional debates, opponents of the bill relied on the fact that the regulations were privately enforceable in order to raise the spectre that broadening the scope of Title VI would spur additional lawsuits against federal funding recipients.[13] The point was hammered home to Congress by the Executive branch. In a memorandum by the Office of Management and Budget that was submitted to Congress during the hearings, the Administration commented that "[the bill] would . . . open all of a recipient's activities to private lawsuits over practices deemed to have 'discriminatory effects,' regardless of intent." *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 532 (1984); *see also id.* at 527 (emphasis in original) ("every

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[13] Senator Hatch, for example, warned that just as federal agencies could bring administrative enforcement actions against states that engage in practices having a disparate impact on minorities, "advocacy groups will be able to bring private lawsuits making the same allegations before federal judges." 134 CONG. REC. 2,421 (1988); *see also* 130 CONG. REC. 18,880 (1984) (statement of Rep. Fields that "a State [will] be subject to private lawsuits because the tests have a disproportionate impact on minorities"); *Civil Rights Act of 1984: Hearing on S. 2568 Before the Subcomm. on Const. of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 153 (1984) (testimony of opponent of bill that Title VI and the other civil rights statutes "have been expanded through regulation and court decisions to cover the effects of discrimination, and the result of these amendments would be to greatly expand the coverage of effects test type protection to areas where it does not exist").

licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in *every* aspect of *every* institution that receives *any* Federal assistance").

Despite the dire warnings of opponents of the legislation, Congress passed the Restoration Act. The fact that Congress knew that the Title VI discriminatory effects regulations were uniformly viewed as privately enforceable, yet expanded the coverage of the Act without changing that view, is strong evidence that Congress intended to preserve the remedy. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. at 381-82 ("[T]he fact that a comprehensive reexamination and significant amendment of [an act of Congress] left intact the statutory provisions under the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *see also Faragher v. City of Boca Raton*, 524 U.S. at 792 ("[T]he force of precedent here is enhanced by Congress' amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding."); *Bob Jones University v. United States*, 461 U.S. 574, 601 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provided added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971.").

"This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon v. University of Chicago*, 441 U.S. at 706 n.40; *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. at 730 (SEC regulation). Given that-

Congress has accepted and the Executive branch has endorsed the federal-court recognition of a cause of action for injunctive relief under the Title VI regulations, the case for continuing to do so is quite compelling. This Court should not revisit the issue.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS THAT HAVE ADDRESSED ENGLISH-ONLY POLICIES

Contrasting the decision here with the decisions in *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), and *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994), Petitioners complain that they have been "directed to do something" that other courts have not required federal agencies to do – namely, print forms in English. Pet. at 19. Taking the complaint one step further, *Amici* contend that the decision below is "in direct conflict with at least four other circuits that have found no generalized requirement in Title VI for examinations, services, or notices to be in languages other than English." Brief of English Language Advocates at 6-7. They point to *Nazarova* and *Toure* as well as to *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975), and *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973). Brief of English Language Advocates at 7. If the decision here is allowed to stand, *Amici* argue, it "will endanger hundreds of state and local governmental policies which require the use of English." *Id.* at 3.[14]

[14] *Amici* also contend that the court below "equated language and national origin." Brief of English Language Advocates at 4. Even a cursory examination of the opinion will reflect that this contention is false. *See* App. 51a – 52a; *see also* App. 157a ("correct analysis . . . is not whether language equals national origin, but whether the policy . . . has an unjustified disparate impact").

There are three major problems with these contentions. First, they focus not on the availability of an implied right of action under the Title VI regulations, but on the applications of the regulations to English-only policies. Because Petitioners have elected to seek review solely on the implied right of action question, they have forfeited any broader claims regarding the validity of those regulations or their application to the English-only policy in this case. *See* Sup. Ct. R. 14.1(a); *see also supra* p. 12 note 7.

Second, the Petitioners and their *Amici* misunderstand the district court's order. The Petitioners were not "directed" to speak in foreign languages, only to develop a plan to accommodate those who do. *See* App. 253a; *see also* App. 227a ("without deciding which practices would meet the requirements of Title VI, while also meeting the administrative concerns of the Department, the court simply notes that the Department currently does nothing, officially, to accommodate non-English speaking resident applicants").

Third, the cases upon which Petitioners and their *Amici* rely are not on point. None of them even raise Title VI claims. *Nazarova*, *Toure*, and *Carmona* were procedural due process challenges (and in the case of *Carmona*, an equal protection challenge) to the practice of providing various governmental notices in English only. *Frontera* raised an equal protection challenge to the practice of

giving a civil service examination only in English. Factually, the cases were quite different from the instant one. In cases such as *Nazarova*, *Toure*, and *Carmona*, the courts have emphasized that governmental notices in English are sufficient, as long as they are reasonably calculated to put the recipients on notice that further inquiry is required, because the recipients are free to have the notices translated for themselves. In this case, the plaintiffs had no such opportunity because the Petitioners' English-only policy prohibited any form of "self-help" on the part of the applicants, including bringing someone to interpret the examination or even using a translation dictionary. App. 170a – 171a. In *Frontera*, the civil service examination case, the burden of translation was substantial, and the job at issue required familiarity with English terms. *See Frontera v. Sindell*, 522 F.2d at 1218-19. Here, the burden of translation was minimal, and English is not a prerequisite. Indeed, Petitioners routinely issue Alabama drivers' licenses to persons who cannot understand a word of English as long as those persons have valid out-of-state licenses.

The facts here are important because they serve as a reminder that plaintiffs in Title VI disparate impact cases are likely to prevail only in those rare instances where a recipient of federal financial assistance acts with little justification. The Department's English-only policy was virtually unique. Forty-eight other states, the District of Columbia, and Alabama itself prior to 1991 had no such rule. The operation of the policy was bizarre. "By providing special accommodations to illiterate applicants, handicapped applicants, [non-English speaking] out-of-state drivers with valid licenses and even foreign nationals

with valid licenses, Alabama single[d] out resident non-English speaking applicants by requiring them to take their examination in English only, without the aid of interpreters or translation aids." App. 185a. More than four years before the case was filed, the Alabama Attorney General recognized that the Department's restrictive policy "might be a violation of Title VI of the Civil Rights Act of 1964," citing this Court's decision in *Lau*.[15] At trial, the Department's explanations for its policy were riddled with inconsistencies. On appeal, the Department did "not contest *any* of the district court's findings," including its conclusion that the Department's "rationales were a pretext." App. 10a – 11a (emphasis in original). Few cases will be as compelling as this one.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[15] The fact that the Petitioners knew that their English-only policy was suspect before this suit was filed undercuts their suggestion that they were somehow blindsided by this case. *See* Pet. at 5, 13, 18.